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Attorney for MAGDALY ORTIZ-MORALES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MAGDALY ORTIZ-MORALES,	)	Case No: C 07-4759 WHA
)	
Petitioner,)	
)	
v.	)	PETITIONER'S REPLY TO
	)	RESPONDENT'S OPPOSITION
	)	TO PETITION FOR WRIT OF
MICHAEL CHERTOFF;	)	HABEAS CORPUS OR
DAVID STILL;	)	TRANSFER OF CASE TO B.I.A.
NANCY ALCANTAR;	)	OR FIFTH CIRCUIT COURT
EDDIE ROBINSON,	)	UNDER REAL ID ACT.
)	
)	
	)	SURPRISING NEW ORDERS
Respondents.	)	FROM THE FIFTH CIRCUIT
	)	COURT OF APPEALS
	)	(COPY ATTACHED)
)	
	)	Hearing Date: October 11, 2007
	)	Time: 8:00 AM

I. SURPRISING NEW ORDERS AND EVIDENCE AND ISSUES

It is respectfully submitted that today, October 5, 2007, petitioner's attorney IRAJ SHAHROK has received the attached Notice and Orders from the Fifth Circuit Court of Appeals ordering this attorney to file the following brief:

1

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION
FOR WRIT OF HABEAS CORPUS; SURPRISING NEW ORDERS FROM
THE FIFTH CIRCUIT COURT OF APPEALS
C 07-4759 WHA

“PETITIONER’S BRIEF AND RECORD EXCERPTS ARE DUE WITHIN 40-DAYS FROM THE DATE ABOVE.” The **letter of September 28, 2007** also indicates that the Clerk of Court has filed the record. Copy attached as **EXHIBIT - 1**.

II. EXAMINATION AND ARGUMENTS

By its Order to this office, the Fifth Circuit Court of Appeals indicates that it did not have the Court Records, that means the TRANSCRIPTS before it issued the prior Order of August 15, 2007 denying Petitioner’s Motion for Stay of Deportation pending review. Copy is attached as **EXHIBIT – 4. Copy of the Order** has been immediately submitted by fax to Mr. Edward A. Olsen, Assistant United States Attorney.

III. CONSEQUENCES OF ORDER OF THE FIFTH CIRCUIT

The effect of this Order on my client the Petitioner is continued incarceration. Her incarceration is continued since she has already been in DHS custody for the last 9 months. Petitioner’s motion on September 20, 2007 to the District Court of San Francisco for a Writ of Habeas Corpus was filed to terminate DHS continued incarceration of Magdaly Ortiz-Morales.

IV. PETITIONER RESPECTFULLY REQUESTS UNDER THE REAL ID ACT

Pursuant to the REAL ID Act, Petitioner makes a motion to transfer the instant case to the U.S. Court of Appeals for the Fifth Circuit. The basis is by §106 (c) of the REAL ID Act requirements and Judicial economy. The Fifth Circuit Court has ordered filing of a brief **within 40 days**. A motion may be granted upon a showing of good cause. Request is made to issue a Stay of Removal for **60 days** to allow the transfer to the Fifth Circuit Court of Appeals.

V. CONCLUSION

Petitioner respectfully requests that this Court grant an Order and time in which to transfer the case to the Fifth Circuit Court of Appeals.

This attorney will be in San Antonio, Texas (for four days) next week at University of Texas on a pre-paid Immigration Conference and respectfully requests time to prepare the transfer order as may be required by the Court.

VI. LEGAL ARGUMENTS FOR RELEASE FROM DETENTION

Applying Kansas v. Hendricks, Zadvydas v. Davis, and De More v. Kim, to the automatic stay regulation at 8 CFR §1003, 19 (i)(2), there is no “special justification” to out-weigh the infringement on the fundamental liberty interest of freedom from restraint. There is no doubt that the government has the authority to detain individuals who are dangerous to others or are flight-risks. But here, Magdaly Ortiz-Morales has been living at the one address in Antioch, California for almost 18 years. She has four U.S. citizen teenage children she has been raising. The older girl Jennifer is 17 years old and in her last year of high school. Two of Petitioner’s youngest children are very sick, 11 year old **Daniel** needs EAR SURGERY in Berkeley, California, as is stated in attached report of Dr. Enz, copy attached as **EXHIBIT - 2**. The second child **Miguel** has ASTHMA and Dr. Enz’s letter of February 2, 2007, copy attached as **EXHIBIT - 3**. Petitioner certainly is not a flight-risk and certainly is not a danger to the community since she has been working to raise these terrific children and keep them in school by cleaning houses and making a home for them here in Antioch, California and has no history of arrests.

Additionally, petitioner is entitled now by law to TPS (Temporary Protected Status) until in January 2009 as she is from Honduras. A TPS Application was filed for her prior to the deadline in July 2007. However, no response has been received from DHS.

VII. CONCLUSION

It is submitted that petitioner's incarceration will now certainly as a result be prolonged on and on. Nine months is an unreasonable period of time as this is becoming a longer detention for the petitioner while she is in imminent danger of removal as stated in the Government's Brief in opposition.

VIII. BOND REQUEST

It is requested that Petitioner be released on her own recognizance or at least a minimum bond of \$1,000 or \$1,500. She has been incarcerated for the last 9 months now and she has no money. One of her sons, 19 year old Jose Ortiz may be able too scrape up \$1,000. However, it is an extreme hardship on this family that has stayed together for the last 19 years.

IX. LEGAL ARGUMENTS: DUE PROCESS VIOLATIONS

Even a short period of parole before final resolution of her removal proceeding would be significant because even a short-term separation from family members is a deprivation which the Supreme Court has repeatedly ranked high among the interests of the individual. Koifman v. Zemski, 2001 US Dist. Lexis 15742 (E.D.P.A. 2001) in Lozada v. INS, 857 F.2d 10, 13-14 (1st Cir. 1988), Michelson v. INS, 897 F.2d 465, 468; has held that a **DUE PROCESS VIOLATION** occurs if the alien can demonstrate **PREJUDICE** which **IMPLICATES THE FUNDAMENTAL FAIRNESS OF THE PROCEEDING.**

Here in this case, the Fifth Circuit Court of Appeals did not even have the transcripts of the Courts below and the proceedings below when it issued an Order canceling the prior Stay Order on August 15, 2007. Copy of Fifth Circuit Order is attached herewith as **EXHIBIT - 4**.

X. CONTINUED INDEFINITE INCARCERATION

Now as a result of the Fifth Circuit Court Order of September 28, 2007, the petitioner could be incarcerated indefinitely for the next several months. Assuming that there will be briefs in opposition and then further appeals, the incarceration will be prolonged further. It is generally held that an alien needs to show at least a reasonable probability of prejudice. Michelson v. INS, 897 F.2d 465, 468. This has been shown here and now by this continued detention. As the Fifth Circuit has said there was no record of the Court Hearings available. Yet it issued a Cancellation of the Stay Order.

This it is respectfully submitted is a VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS. It is requested Petitioner be released on O.R. or minimum bond.

XI. PETITIONER NOT REPRESENTED

Petitioner has not had an attorney at any stage until this attorney IRAJ SHAHROK entered the case recently but prior to that she was in the hands of a notario who mislead her to leaving on alleged DHS parole. PLEASE NOTE, SHE WAS JUST A 17 YEARS OLD REFUGEE FROM HONDURAS WHEN SHE CAME. Thus Petitioner has argued throughout ineffective assistance of counsel. Besides, the petitioner, a long time resident, is entitled to **TPS until January 2009**. This is the Government's own regulation and the Government must abide and act according to its own regulations and its refusal to grant TPS to the petitioner is in

itself highly prejudicial and a serious DUE PROCESS VIOLATION OF THE FIFTH AMENDMENT WHILE ALL ALONG HURRYING TO GET HER VISAS TO DEPORT HER TO HONDURAS.

Petitioner therefore respectfully request the following relief:

- 1) Grant of Habeas Corpus or transfer of case to the Fifth Circuit.
- 2) Immediate issuance of a Stay Order and time to effectuate the transfer.
- 3) Issue a permanent Order ordering Respondents to release the Petitioner forthwith on O.R. or minimum \$1,000 bond to return to her home at 321 West 9th Street, Antioch, California, 94509, telephone number (510) 638-1596, and her four teenage children in Antioch, California.
- 4) Re-Open her case and removal to the Immigration Court in San Francisco, California at 120 Montgomery Street, Suite 800, San Francisco, California 94104.
- 5) In view of the Notice from the Fifth Circuit Court of Appeals and the delay and continued incarceration, that the petitioner be declared a prevailing party and award her attorney's fees and costs and EAJ Fees as the position of the United States in this litigation is not substantially justified; award to Petitioner Magdaly Ortiz-Morales compensatory damages under E.A.J, 403 US 388 (1971) for the Fifth Amendment violations;
- 6) Award any other relief this Court deems reasonable and proper and grant the petitioner TPS (Temporary Protected Status) as she is from Honduras at least to January 2009 which is the present term for TPS beneficiaries and allow her to file

for Cancellation of Removal (IN ABSENCE OF A TRANSCRIPT) and or C.A.T. or Withholding of Removal or Deferred Removal in view of facts presented in her new Asylum Application (I-589) (execution of her brother in Honduras) filed in San Francisco, California on April 2007, not acted upon by DHS.

Date: October 9, 2007

Respectfully submitted:

IRAJ SHAHROK
Attorney for Petitioner
Magdaly Ortiz-Morales

IS:las

EXHIBITS:

- EXHIBIT – 1 **Copy of Fifth Circuit Order of September 28, 2007 Ordering a Brief within 40 days.**
- EXHIBIT – 2 Dr. Enz's letter of January 26, 2007 regarding 11 year old **Daniel's need for Ear Surgery**
- EXHIBIT – 3 Second child **Miguel has asthma** and Dr. Enz's letter of February 2, 2007
- EXHIBIT – 4 Fifth Circuit Court Order canceling its prior Stay Order on August 15, 2007
- EXHIBIT – 5 **Copies of children's U.S. Birth Certificates**

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PROOF OF SERVICE

On **October 9, 2007**, I served the attached:

- ***PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS OR TRANSFER OF CASE TO B.I.A. OR FIFTH CIRCUIT COURT UNDER REAL ID ACT.***

on the parties in said action by placing a true copy thereof as indicated below as follows:

JUDGE WILLIAM H. ALSUP (via ECF)
United States District Court
Northern California
450 Golden Gate Avenue
San Francisco, CA 94102

EDWARD A. OLSEN (Defendant/s) (via ECF)
Assistant United States Attorney
SCOTT N. SCHOOLS
United States Attorney
JOANN M. SWANSON
Chief, Civil Division

450 Golden Gate Avenue, Box 36055
San Francisco, CA 94102

(X) BY E-MAIL / ECF: I caused a copy of such document to be sent via ECF.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Belmont, California on **10/09/2007**.

IRAJ SHAHROK, ESQ.